# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1957

No. 359

ROBERT L. MARTIN,

*Petitioner,*

vs.

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners, doing business as Birch, Lytle & Green,

*Respondents.*

L. A. MARTIN,

*Petitioner,*

vs.

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners, doing business as Birch, Lytle & Green,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals for the Ninth Circuit.


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## PETITION FOR A WRIT OF CERTIORARI

**to the United States Court of Appeals for the Ninth Circuit.**

Petitioners, Robert L. Martin and L. A. Martin, pray that a Writ of Certiorari be issued to review the

judgment of the United States Court of Appeals for the Ninth Circuit reversing judgments upon jury verdicts given in the District Court for the District of Alaska, Third Division.

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## OPINION BELOW.

The District Court did not render an opinion. The opinion of the Court of Appeals is reported at ..... F. (2d) .....

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## JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 15, 1957. The jurisdiction of this Court is invoked under Sections 1254 and 2101 of the Judicial Code (Act of June 25, 1948, C. 646, Sections 1254, 2101; 62 Statutes 828, 961; 28 U.S.C.A. 1254, 2101) and rules 21, 22, and 23 of the revised rules of the Supreme Court of the United States, adopted April 12, 1954, effective July 1, 1954, and other Court rules.

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## QUESTIONS PRESENTED.

1. Whether the Court of Appeals violated the Seventh Amendment of the Constitution of the United States by reversing a jury verdict of the Court below, and if said reversal did not violate the Seventh Amendment: whether the Court of Appeals erred in failing to award a new trial.

2. Whether the decision of the Court of Appeals for the Ninth Circuit herein conflicts with the decisions of the Court of Appeals for the District of Columbia in *Lansburgh & Bro. Inc. v. Clark,* 127 Fed. (2d) 221, and the United States District Court for the District of Missouri in *Franklin v. May Dept. Stores Company,* 25 Fed. Supp. 735.

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**STATUTORY REGULATIONS INVOLVED.**

Rule 50 of the Federal Rules of Civil Procedure.

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**STATEMENT.**

The two petitioners herein obtained judgments in the District Court for the Third Judicial Division, Territory of Alaska, upon jury verdicts. The two cases had been consolidated for trial and the cases involved essentially the same facts. A Remittitur of $2,500.00 was ordered in one of the cases before judgment was entered.

The petitioners' claims resulted from personal injuries suffered through physical attacks by a group of men, at, or near, the Asphalt Paving Plant of the construction company which was in the process of paving the highway. The construction company had furnished its employees, or former employees, alcoholic drinks and a completion celebration, participated in by the superintendent and foremen, was in full force at the time of the injuries to the petitioners.

The two petitioners' cases were consolidated for trial which covered approximately five days. Jury verdicts were rendered for the petitioners in both cases with a total compensatory and punitive award of $9,000.00 for petitioner L. A. Martin, and a total compensatory and punitive award of $10,000.00 for petitioner Robert Martin. The $9,000.00 award for petitioner L. A. Martin was reduced by a Remittitur of $2,500.00, and judgments were entered in both cases.

Both actions in the District Court were brought against the construction company known as Birch, Lytle & Green, which consisted of a three corporation partnership, and against five individuals. Two of the named individuals were Ross McDonald and R. E. Wise, the general superintendent and a foreman respectively. In both cases Ross McDonald and R. E. Wise were freed of liability by the jury. In the Robert L. Martin verdict the jury held the company and one individual liable, and in the L. A. Martin case the jury held the company and two individuals liable. Of the defendants, the company alone appealed to the Court of Appeals for the Ninth Circuit. Petitioner L. A. Martin cross-appealed on the question of Remittitur.

The Appellate Court held that the construction company could neither be held under the doctrine of *respondeat superior* nor under the theory of negligent control of the area in their possession. The doctrine of *respondeat superior* was rejected by the Appellate Court after determination by the appeals Court that none of the men who had assaulted the petitioners

were on duty. The appeals Court further rejected the negligent control theory after another determination, by the appeals Court, that the company was not negligent independent of its supervisory employees. The appeals Court thus held that the release of the two supervisory employees, McDonald and Wise, relieved the construction company of liability. The judgments in both cases were reversed by the Court of Appeals.

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**SPECIFICATIONS OF ERRORS TO BE URGED.**

The Court of Appeals of the Ninth Circuit erred:

1. In holding that the construction company was not liable under the doctrine of *respondeat superior.*

2. In holding that the construction company was not liable under the theory of negligent control of the area in their possession.

3. In holding that there was an inconsistency of verdicts wherein the jury released McDonald and Wise, but held the company.

4. In holding that the company was not negligent independent of its supervisory employees.

5. In substituting the opinion of the appeals Court in place of that of the jury and in failing to order a new trial in the Court below.

6. In failing to set aside the remittitur which was not based upon any reason, but was arbitrarily assessed.

7. In considering the sufficiency of the evidence when time card exhibits of the construction company employees were not included in the record.

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**REASONS FOR GRANTING THE WRIT.**

The greatest error of the Court of Appeals was its failure to take into consideration that part of the Seventh Amendment, "... and no fact tried by a jury, shall be otherwise reexamined in any court of the United States than according to the rules of the common law." The result was an opinion and judgment directly in conflict with *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, wherein it was held that the Circuit Court of Appeals could only direct that a new trial be had, if error in the trial Court were found.

The *Slocum* case applies, despite the application of rule 50(b) of the Federal Rules of Civil Procedure, and the later cases modifying the *Slocum* case, for the reason that the question of judgment *n.o.v.* was not properly before the Court of Appeals so as to enable the Appellate Court to apply the doctrine of *Montgomery Ward & Co. v. Duncan*, 61 S.Ct. 189, 311 U.S. 243, 85 L. Ed. 147, and enter judgment *n.o.v.* The judgment of the lower court was reversed upon the theory of inconsistencies of verdicts. This ground was never set forth in any motion made in the District Court, nor, for that matter, was it even urged on appeal. The specifications of error relied upon by the appellant were set forth as follows:

"1. That the evidence was insufficient to establish the relationship of employer and employee, master and servant or principal and agent as between the appellants and the participants in the wrongful acts complained of by the plaintiff.

2. That there was insufficient evidence to establish that the appellants were guilty of an intentional tort.

3. That the verdict was contrary to the law and to the evidence.

4. That the trial court erred in denying defendants Birch, Lytle & Green's motion for a directed verdict made at the close of the plaintiff's case and renewed at the close of all evidence.

5. That the trial court erred in denying appellants' motion for judgment notwithstanding verdict.

6. (07) That the trial court erred in denying appellants' motion for a remittitur.

6. (08) That the trial court erred in ordering a remittitur as to the general damages and making no remittitur as to the punitive damages.

7. That the trial court erred in instructing the jury as excepted to by the appellants at the time of trial, and particularly erred in instructing the jury on mob violence.

8. That the trial court erred in failing to instruct as requested by the appellants.

9. That the verdict is excessive.

10. That the trial court erred in submitting punitive damages to the jury so far as the appellants are concerned.

11. That the trial court erred in its minute order of February 9, 1956 in respect to the fixing of interest upon the judgment."

Since these specifications show that inconsistency of verdict was not before the court on appeal, such a ground could not have been before the court in the motion for judgment *n.o.v.*

It is true that a motion entitled "Motion for Judgment for defendant Birch, Lytle & Green" was filed on October 12, 1955 two days after the return of the verdicts in the two cases. However, there is nothing in the motion that even suggests by inference that inconsistency of verdicts was one of the grounds. Thus, it can be seen that if the judgment of the Court of Appeals is a judgment upon a motion for a directed verdict or for a judgment *n.o.v.*, no motion has ever set forth the specific grounds upon which the cases were actually reversed.

Since the grounds were not set forth in the motion in the District Court, this case raises questions closely related to the case of *Johnson v. New York, N.H. and R.H. Company*, 344 U.S. 48. The *Johnson* case had a strong dissent, so it should be noted that the requirement of the statement of specific grounds in the case at bar is not "obedience to lifeless formality" for had the motion contained the specific grounds, a different result may have prevailed in the District Court. In any event, the District Court should have been given a chance to exercise its discretion as this Court has held in *Cone v. West Virginia Pulp &*

*Paper Co.*, 330 U.S. 212. The question is also very similar to that of *Fountain v. Filson*, 336 U.S. 681 wherein this court held that the Court of Appeals could not enter a judgment on an entirely new issue.

The Court of Appeals' opinion appears to indicate that the error was that of the jury in releasing two of the supervisorial employees, McDonald and Wise, while holding the company. In referring to the question of negligent control of the area the appeals Court stated at page 431 of the record.

> "There was sufficient evidence of Appellant's breach of its duty to present this issue to the jury."

The Court also indicated for almost half a page just what the evidence consisted of, and from this statement it appears to be a reasonable inference that the Court of Appeals felt that there was negligence. The logical conclusion from this, after the jury absolved McDonald and Wise from individual responsibility, would be that the jury had either acted arbitrarily or had been improperly instructed. In either event, the proper course for the Appellate Court would have been to order a new trial, and not to substitute its own opinion for that of the jury.

Also, although this case does not involve missing evidence which was within the power of the petitioner to produce as in *Galloway v. United States*, 319 U.S. 372, the petitioners could unquestionably strengthen their case by a new trial. This was pointed out by the dissent at page 411 of the *Galloway* case. If more

evidence is necessary to convince the Court, than to convince the jury, this should be done through a new trial.

2. If the liability of the employer were based solely on the doctrine of *respondeat superior* the petitioners could not have joined the employer and employees under the old common law system, since the actions would have been by two different writs, namely *case* and *trespass*. 98 *A.L.R.* 1058. With this in mind, it appears that the holding in the cases at bar cannot be reconciled with that of *Lansburgh & Bro. Inc. v. Clark*, 127 Fed. (2d) 221, Court of Appeals for the District of Columbia. The cited case involved inconsistent verdicts wherein the jury brought in a verdict for the husband, but against the wife where the cause of action was based upon injuries to the wife. The Court in the *Lansburgh* case indicated that the actions of the husband and wife could not have been joined at common law and that since they could be joined under Rule 20 that the result should not be different.

Although the inconsistencies involved the two plaintiffs in the *Lansburgh* case, and the defendants in the case at bar, the effect is substantially the same. With reference to the two different verdicts the court stated at page 333 of the *Lansburgh* opinion:

> ". . . That they are inconsistent is obvious. The same jury listened to the same argument and the same evidence at the same time in both cases and rendered two irreconcilable verdicts. They either mistakenly or arbitrarily failed to perform their duty . . ."

Then after this determination, the Court in the *Lansburgh* case refused to decide which verdict was wrong and affirmed the judgment for the husband based upon the inconsistent verdict. The Court indicated that the granting of a new trial as to both husband and wife could have been proper, but the motion was made for a new trial only as to the husband, the prevailing plaintiff. The motion in the case at bar was made only as to the losing defendants. The holding of the case decided by the Court of Appeals for the Ninth Circuit cannot be reconciled with the holding of the Court of Appeals for the District of Columbia.

The holding of the Court of Appeals is, essentially, that the principal would not be liable for the non-feasance, consisting of the negligent control of the area, unless its two supervisory employees were also liable. This, by inference, is contrary to the holding in *Franklin v. May Dept. Stores Company*, 25 Fed. Supp. 735, D.C. Mo., which case involved the question of liability of the employee for non-feasance. The opinion in the cited case states at page 736:

> "There can be no recovery from an agent or servant for non-feasance alone unless the agent has assumed and actually commenced such a complete and exclusive control of management or operation as to warrant saying that he failed in discharging or completing a duty theretofore assumed and commenced."

Thus, the company could be liable for its omissions of duty toward the public, but unless complete and ex-

clusive control was in the employee, the employee would not be liable.

It does not appear that any determination was ever made by the Court of Appeals that McDonald and Wise had assumed complete and exclusive control of the area, and petitioners' claims were based on the theory of possession being in the company. So the Court of Appeals holding that the release of the employees releases the employer without a showing of complete and exclusive control in the employee appears to directly conflict with the holding of the Missouri District Court in the *Franklin* case.

Finally, it should be noted that throughout the ten page opinion of the Court of Appeals the facts of these cases have been determined, discussed and distinguished. Then, upon these facts, in the finding of which reasonable minds could have differed, the Court misapplied the law. As indicated by the dissent in the *Galloway* case with respect to the question of usurping the jury function this case "marks a continuation of the gradual process of judicial erosion. . . ." Perhaps the erosion here is more than gradual when it is considered that the Appellate Court overturned jury verdicts, reached after a long trial on grounds that were not even considered by appellants' counsel upon appeal.

## CONCLUSION.

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Dated, Anchorage, Alaska,
August 7, 1957.

Respectfully submitted,
BAILEY E. BELL,
JAMES K. TALLMAN,
*Attorneys for Petitioners.*

**(Appendix Follows.)**

## Appendix

United States Court of Appeals
for the Ninth Circuit

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| S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellants.<br>vs.<br>Robert L. Martin, Appellee. | No. 15,107 |
| S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellants.<br>vs.<br>L. A. Martin, Appellee. | No. 15,108 |
| L. A. Martin, Appellant,<br>vs.<br>S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellees. | May 15, 1957 |

Appeals from the District Court for the District of Alaska, Third Division

Before: Bone, Fee and Barnes, Circuit Judges

Barnes, Circuit Judge:

On August 14, 1952, along a narrow strip of highway approximately six miles south of Anchorage,

Alaska, L. A. Martin (hereinafter, Martin Sr.) and his son, Robert Martin Jr., were beaten and bloodied by a group of road construction workers, buoyed by alcoholic beverages and the happy knowledge of a job completed.

Subsequently, the father and son filed these actions against S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, (partners doing business as Birch Lytle & Green) and five individual defendants, Ross McDonald, Cecil "Joe" Sipes, John P. Bell, Duane J. "Bud" Weber, and Raymond E. Wise, all employees of the aforementioned partnership. The actions were consolidated for trial. The cases were tried by a jury, which returned a verdict in favor of Martin Sr. against the three corporate partners, and Bell and Weber, individually, for $7,000 compensatory and $2,000 punitive damages. The trial judge later directed and Martin Sr. consented to remittitur of $2,500 of the compensatory award. The jury also returned a verdict in favor of Martin Jr. against the three corporate partners, and Weber, individually, for $7,500 compensatory and $2,500 punitive damages. McDonald and Wise were exonerated in each action. Sipes was not served with summons and did not participate in the trial. The defendant partnership alone prosecutes these appeals. Martin Sr. has cross-appealed, challenging the propriety of the remittitur.

The incident took place alongside and on a twenty-foot wide stretch of highway. The defendant partnership had just completed work on approximately one

thousand feet of new paving on the west half of said highway. The narrow width of the highway necessitated vehicular traffic control by flagmen employed by the partnership. These men were stationed at barricades at each end of the construction zone. They permitted north and southbound traffic to travel alternately along the eastern ten feet width of the highway.

Sometime after 6:00 P.M. and before 7:00 P.M., the plaintiffs, driving their automobile south through the gathering twilight at the head of a procession of southbound traffic, were flagged onto the eastern one-half of the highway. After traveling approximately one-half the distance through the traffic control, the plaintiffs' vehicle found its forward progress blocked by a northbound car, driven by Sipes, in which Weber was a passenger. The impasse occurred immediately opposite the gravel pit and asphalt plant, which together with the partnership office and a scale house, were located off the highway to the west. There was no traffic behind the northbound car; there was an undetermined amount of traffic behind the southbound car.

Each driver insisted that the other give him the right of way. An altercation ensued. At this point, the testimony differs. According to the conflicting evidence, Martin Jr., the driver of the southbound car, was grabbed by Weber who stood, "half-soused," with beer can in hand outside the Martins' car window and when Martin Jr. tried to disengage himself, Weber pulled him out of the car, *or*, he (Martin Jr.) jumped out of the car without provocation to do battle with Weber, who was empty-handed and merely feeling

"happy." Martin Jr. was knocked down by one and attacked by four or five men (including Sipes) and kicked in the mouth, *or*, he knocked down Weber three times, and as one witness positively stated—was never struck himself. The stories of Martin Sr.'s activities are just as disparate. He was struck in the face and knocked unconscious by Bell, either while reaching for a lug wrench in the car trunk, which he sought in order to aid his son, *or*, after he had obtained the wrench and was rushing into the melee to even it up.

When Martin Jr. saw his father lying on the ground he hurried to his side to protect him from further blows. None were forthcoming. Martin Jr. then lifted his father back into the car and prepared to depart. However, the milling group of men surrounding the car, estimated at ten to fifteen in number, refused to permit them to leave the area. One of the men—supposedly McDonald—told the Martins that "We have taken off you S.B.'s for the last four or five years; now, you're going to listen to us; you're not going anywhere." Martin Jr. obeyed instructions and remained at the scene. His auto, a former taxicab, had a two-way radio in it, and he called the police. After a few minutes wait the Highway Patrol arrived on the scene and plaintiffs were allowed to leave. The entire incident did not consume more than forty minutes.

There is no doubt that the plaintiffs were beaten by someone during the fray. Martin Sr. sustained bloody and cut lips, loss of his set of artificial dentures, a large knot like lump—"as big as an egg"—on the back

of his head, a concussion, and sundry other more minor injuries. Martin Jr. suffered a concussion, a badly cut eye, a bruised knee, had two teeth knocked out and several others loosened.

At the trial the defenses of mutual combat and self-defense were presented by counsel for the defendants, but the jury obviously rejected both of them. It apparently accepted plaintiffs' version of the fracas as related above. We cannot disturb its resolution of conflicts in the evidence as to who among the individuals sued bore the responsibility for the assault. *Parker v. Title & Trust Co.*, 9 Cir., 233 F.2d 505; *Capital Transit Co. v. Bingham*, D.C.Cir., 212 F.2d 241.

The evidence raises certain questions of law. Two distinct theories upon which liability of the defendant partnership could be predicated were submitted to the jury. Plaintiffs sought to impose both vicarious and direct liability on the partnership. Vicarious liability rested squarely on the doctrine of respondeat superior. Direct liability was founded on alleged negligence in failing to use reasonable care to protect highway users during their passage through the controlled area from the unlawful acts of employees.

To hold the partnership responsible under the doctrine of respondeat superior, plaintiffs were required to prove that the attack upon them by the employees occurred during the course and in the scope of their employment.[1] The pummeling administered plaintiffs

[1] N.L.R.B. v. International Longshoremen's & Warehousemen's Union, 9 Cir., 210 F.2d 581.

by Weber, Bell, and Sipes constituted no less than an aggravated assault and battery.[2] Their actions were willful, wanton and intentional. Indeed, plaintiffs contend their conduct was criminal in character.[3] The fact that the unlawful activity was intentional and even criminal does not per se take it out of the scope of employment. "It is accepted law that the master may be liable for the willful and malicious acts of a servant . . ." *Novick v. Gouldsberry,* 9 Cir., 173 F.2d 496, 500. But such fact is an important consideration in ascertaining if the specific acts charged occurred while the servant was acting within the scope of his employment. Its precise effect in a given case will vary with the particular factual context involved.

Here the acts complained of constituted battery. "To create liability for a battery by a servant upon a third person, the employment must be one which is

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[2]Plaintiffs alleged in their separate complaints that several unidentified "John Does", also employees of defendant partnership, participated in the fight. But they were unable to identify these unknown persons or their employer at the trial. Since persons other than employees of defendant partnership were present at the construction site, it seems highly dubious that the partnership could be held liable for the acts of the unidentified "John Does." In any event, the same considerations that control the question of scope of employment of the identified aggressors would also apply to the unidentified persons.

[3]Both parties have devoted much effort to a discussion of liability based on "mob violence." Such conduct is deemed criminal under the law of the Territory of Alaska. ACLA 65-10-1 (1949). However, it is the general rule, and no Alaska legislative history or judicial decision is cited to the contrary, that such legislation does not create a new basis of statutory liability independent of common law liability. The civil action remains one for trespass or assault committed pursuant to the mob enterprise. 46 Amer. Jur. 135. Accordingly, the text discussion of the partnership's liability for its employees' assaults comprehends this theory.

likely to bring the servant into conflict with others." Restatement of Agency, §245, Comment a. What is needed is a functional relationship between the employment and the wrongful act or acts. It must be shown that "the particular tortious act was (not) clearly unrelated to the accomplishment of any of the objects of the employment." *Novick v. Gouldsberry,* supra, at p. 501. Where the connection is too remote and attenuated, the master is not liable. Under such conditions the only reasonable inference to be drawn from the servant's conduct is that he is giving vent to personal feelings and is seeking solely to further his personal interests. "When this is the case, the mere fact that the act which caused the harm was done while the servant was acting in the employment and on the employer's premises would not result in liability. 35 Amer. Jur., Master and Servant, Sec. 55; Restatement, Agency, Sec. 245, Comment (d), p. 550." *Novick v. Gouldsberry,* supra, at p. 501. It must appear that the employee is acting in part at least in the interests of his employer; mixed motives will suffice. But where the employee acts only to further his own interests, the employer is not liable. *Nelson v. American-West African Line,* 2 Cir., 86 F.2d 30. The question is essentially one of degree. An assault by a hockey player on a spectator may justify vicarious liability, *M. J. Uline Co., Inc. v. Cashdan,* D.C.Cir., 11 F.2d 132, whereas an assault by one construction worker upon another may not. *Park Transfer Co. v. Lumbermen's Mut. Cas. Co.,* D.C.Cir., 142 F.2d 100. Each case must be decided in its own unique factual setting.

Applying these general principles to the case at bar, we find that both Weber and Sipes were truck drivers, and Bell was a paving operator. None had any duties which necessitated or were likely to call for the use of force. None even had any duties which were likely to bring any of them into direct contact with passing motorists. None was charged with controlling the flow of traffic in the restricted area or with clearing road jams. Moreover, none of the identified trio were *on duty* when the incident occurred. *All* had checked out for the day and were on their way home. The time cards show that Bell signed out at 5:30 p.m. and Weber at 6:00 p.m., while Sipes completed his shift at 5:30 p.m. also. Their continued presence at the work site was due to their desire to participate in the job completion celebration. They had no duties while *on work* which would warrant the conclusion that their wrongful acts were committed while they were acting within the scope of their employment; a fortiori when they were *off work*. The proximity to their employment was geographical not functional. Such proximity is not enough to establish liability.

It is, of course, quite possible that during the course of their labors on this particular project the men became irritated with highway users who interrupted or impeded their work. In their uninhibited state they may well have pictured plaintiffs as the personifications of the Despised Motorist. Nonetheless, as a distinguished commentator has pointed out: "The servant's act in punishing persons who annoy him in the performance of the service . . . can very seldom be

regarded as within the (scope) of the employment." 2 Mechem, Agency, 2 Ed. 1914, §1978. This is not one of those rare situations.

It might be argued that while the aggravated assaults would not under ordinary circumstances come within the scope of the employment of the known assailants, they would in this particular instance because a managerial official of the defendant partnership either authorized or ratified them. McDonald was the general superintendent on the construction project. There is no evidence in the record that he authorized or approved in advance, or even acquiesced, in the attacks upon the Martins. His presence on the scene begins just as the actual brawling was ending. He reached plaintiff's car at the same time Martin Sr. was knocked to the ground. No further physical injuries were inflicted on plaintiffs thereafter. McDonald is charged with detaining plaintiffs and he admits that he ordered them off the road to alleviate the traffic clog. In respect to the remarks he purportedly made to plaintiffs, heretofore quoted in full, which were tinged with antagonism and indicated satisfaction with plaintiffs' plight, there is no credible basis in the record establishing McDonald as their source. Both Martins said they saw McDonald and heard him speak but neither was able to identify him at the trial; in fact, Martin Sr. mistakenly identified another man as McDonald. Martin Jr. did *not* testify that he heard the profane taunt, although he was in full possession of his faculties when it was supposedly uttered. Martin Sr. claimed that he heard the remarks while re-

gaining consciousness and while he was still "coming and going" and that an anonymous onlooker identified McDonald as the speaker. This is hardly adequate evidence to bind the partnership, on a theory of ratification, to vicarious liability.

Our holding in the instant cause does not conflict with the decisions of this Court in the *Novick v. Gouldsberry*, supra, and *Pac. Tel. & Tel. v. White*, 9 Cir., 104 F.2d 923, cases. In *Novick* we upheld a judgment against a saloonkeeper for an assault made by a bartender while on duty, on the ex-husband of the bartender's wife. The rationale of the decision was that the bartender, by the very nature of his employment, "was authorized to maintain order in the saloon, and the assault was committed in the course of his keeping order." 173 F.2d 496, 501. In *White* the employer was held liable for an assault committed upon a suspected robber by its chief special agent while attempting to procure a confession. The agent had general authority to make a full investigation of the robbery and consequently the assault committed pursuant to his investigation did not fall outside the scope of his employment. The bartender in *Novick* and the special agent in *White* both had jobs which were likely to bring them "into conflict with others." Restatement of Agency, §245, Comment (a). In each of those instances it could be said that the employee was acting to some degree in his employer's interest. That vital link—there present—is here absent. The respondeat superior doctrine cannot apply.

The fact that vicarious liability cannot be sustained does not necessarily absolve the partnership from any and all liability.

The relationship of employer and employee creates under certain circumstances a duty on the employer to use reasonable care to control the activities of the employee on the work premises so as to prevent harm to persons coming onto the premises, despite the fact that such activities are not within the scope of employment and are done solely to advance the personal interest of the servant.[4] Prerequisite to liability is a showing that the employer knew or should have known of the necessity and opportunity for exercising such control.

The jury was properly instructed as to the nature and scope of this duty. And a plausible basis for its application to the instant case might be constructed, if it were not for one overriding and insurmountable difficulty.

The scope of the duty in a highway construction zone realistically extends over the entire area where control by the employer is effective. The imposition of the duty is especially appropriate in the immediate vicinity of the highway. It existed at the site of this melee. There was sufficient evidence of appellant's breach of its duty to present this issue to the jury. The evidence shows that McDonald authorized the pur-

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[4]Fletcher v. Baltimore & Potomac Ry. Co., 168 U.S. 135, 18 S.Ct. 35, 42 L.Ed. 411; In re Sabbatino & Co., 2 Cir., 150 F.2d 101; Restatement of Torts, §317; Restatement of Agency, §213; Harper & Kline, "The Duty to Control the Conduct of Another," 43 Yale L.J. 886, 896 (1934).

chase of whiskey and beer in plentiful quantities for the men. Sipes and Weber, fearful such supply would be insufficient, procured more for their private supply and use. McDonald and Wise, also a Superintendent, were both aware that this was a job completion celebration. It is common knowledge that such occasions furnish the opportunity for, in the vernacular, "letting off steam." They saw the men consume the liquor and then obtain more beer. Surely they perceived the gay frame of mind of the men. They also saw the men congregate and remain in the construction zone area. However, despite having provided the alcoholic beverages to the men, they took no precautions to insure safe passage for motorists through the area. They had the ability to do so. This was incontrovertibly established by the undisputed evidence that when McDonald ordered Weber to desist from further brawling and to leave the area, he (Weber) obeyed. Under such circumstances the question of their negligence, if any, was for the jury to determine. Thus, it would appear that a valid theory of liability exists to support the jury verdict were it not for one crucial fact. It is, of course, true that the particular theory upon which the jury did base its verdicts is unknown. We already have held that one of the two alternatives—respondeat superior—was unsustainable. We now must hold that the second theory—negligent control—cannot be supported.

The fatal flaw in this latter theory is that the defendant partnership would be liable under the facts of this case only if its supervisorial employees, Mc-

Donald and Wise, had been derelict in the performance of their duties. The record does not disclose any independent negligent conduct on the part of the partnership itself. There is no evidence that the partners from the facts known or which should have been known to them, knew or should have known of the necessity of taking additional steps to protect the personal safety of passing motorists.[5] If they had any duty to act, it was by and through their superintendents on duty. The record reveals that McDonald and Wise were the only superintendents on duty and at the scene of the fight. They provided the liquor and they were responsible for policing the premises and controlling the men. Yet the question of their negligence in respect to the control of the restricted area was submitted to the jury in the same instruction as was the question of negligence of the defendant partnership. The jury absolved both McDonald and Wise from individual responsibility. We can only conclude therefrom that it found neither was negligent. The master's liability being wholly derivative, the release of the servants bars any recovery against the master. 57 C.J.S., Master & Servant, §619 (b), p. 421-2.

There being no valid basis for the compensatory damages awards, it follows that the awards of punitive damages—resting on the same ground as the compensatory verdicts—cannot stand.

[5]See Hedrick v. Fraternal Order of Fishermen of Alaska, 103 F.Supp. 582.

In view of our determination of the instant case we do not reach the merits of other points raised by appellant.

The cross-appeal of L. A. Martin remains to be considered. By it, he attempts to contest the validity of the remittitur to which he consented. He was not compelled to do this. He could have had a new trial, but he preferred to choose the reduced amount. He cannot now question the propriety of the judgment to which he gave consent. *Lewis v. Wilson,* 151 U.S. 551, 14 S.Ct. 419, 38 L.Ed. 267.

The judgments in these consolidated cases are hereby REVERSED as to the defendant partners only.

(Endorsed:) Opinion. Filed May 15, 1957.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

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|---|---|
| S. Birch & Sons, etc., et al., Appellants, vs. Robert L. Martin, Appellee. | No. 15,107 |

## JUDGMENT

Appeal from the District Court for the District of Alaska, Third Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Third Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of Appellants and against the Appellee.

It is further ordered and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

(Endorsed) Judgment

Filed and Entered: May 15, 1957

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

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|---|---|
| S. Birch & Sons, etc., et al., Appellants, vs. L. A. Martin, Appellee. | No. 15,108 |
| L. A. Martin, Appellant, vs. S. Birch & Sons, etc., et al., Appellee. | |

## JUDGMENT

Appeal from the District Court for the District of Alaska, Third Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the District of Alaska, Third Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of Appellants S. Birch & Sons, and against the Appellee.

It is further ordered and adjudged by this Court, that the Appellants S. Birch & Sons, recover against

the Appellee for their costs herein expended and have execution therefor.

Endorsed) Judgment—Filed & Entered: May 15, 1957

Paul P. O'Brien, Clerk.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1957

## No. 359

ROBERT L. MARVIN,

*Petitioner,*

vs.

S. BURCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Burch, Lytle & Green,

*Respondents.*

L. A. MARVIN,

*Petitioner,*

vs.

S. BURCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Burch, Lytle & Green,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

DAVIS, HUGHES & TOUSSAINT,
EDWARD V. DAVIS,

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1957

No. 359

ROBERT L. MARTIN,

*Petitioner,*

vs.

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch Lytle & Green,

*Respondents.*

L. A. MARTIN,

*Petitioner,*

vs.

S. BIRCH & SONS, a corporation, C. F. LYTLE, a corporation, and GREEN CONSTRUCTION COMPANY, a corporation, partners doing business as Birch Lytle & Green,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

I.

## STATEMENT AS TO PROCEEDINGS AND RECORD.

The petitioners' request for writ of certiorari arises out of litigation resulting from an incident on the 14th day of August, 1952, occurring approximately six miles south of Anchorage, Alaska, which resulted in the bringing of two separate suits, one by Robert L. Martin, son, and a separate suit by L. A. Martin, father, against the respondents herein and five individual defendants. The individual defendants included Ross McDonald and R. E. Wise, the supervisory employees of the corporate partnership. Joe Sipes, one of the individual defendants, was not served and accordingly the action was dismissed without prejudice as to that defendant. The actions were consolidated for trial. The cases were tried by a jury, which returned a verdict in favor of Martin Sr. against the three corporate partners and Bell and Weber, individually, for $7000.00 compensatory and $2000.00 punitive damages. The trial judge later directed, and Martin Sr. consented to, a remittitur of $2500.00 of the compensatory award. The jury also returned a verdict in favor of Martin Jr. against the three corporate partners and Weber individually for $7500.00 compensatory and $2500.00 punitive damages. Ross McDonald and R. E. Wise, the supervisory employees of the defendant corporate partnership, were exonerated in each action. The defendant corporate partnership prosecuted the appeal and Martin Sr. cross-appealed, challenging the remittitur to which he had consented in the lower Court.

The matter was heard before the United States Court of Appeals for the Ninth Circuit, as will be seen by the appendix of the petitioners' brief, page xiv. The United States Court of Appeals for the Ninth Circuit reversed the judgment in these consolidated cases as to the defendant corporate partners Birch, Lytle and Green only.

From this determination in the United States Court of Appeals for the Ninth Circuit, the petitioners seek writ of certiorari to the Supreme Court of the United States, presenting the questions as follows:

> 1. "Whether the Court of Appeals violated the Seventh Amendment of the Constitution of the United States by reversing a *jury verdict* of the Court below, and if said reversal did not violate the Seventh Amendment; whether the Court of Appeals erred in failing to award a new trial." (Emphasis added.)
>
> 2. "Whether the decision of the Court of Appeals for the Ninth Circuit herein conflicts with the decisions of the Court of Appeals for the District of Columbia in Lansburgh & Bro. Inc. v. Clark, 127 Fed. (2d) 221, and the United States District Court for the District of Missouri in Franklin v. May Dept. Stores Company, 25 Fed. Supp. 735."

The respondents respectfully urge that the petitioners' question one is the only question that could possibly merit the consideration of this Court. Granting that question one is valid, it is still necessary to interpret the question presented by petitioners in the light most favorable to the petitioners in order to have

a proper query for the Court. Accordingly respondents deem that the true question here presented is whether or not the holding of the United States Court of Appeals for the Ninth Circuit in the case at bar is in conflict with the procedural aspect of Rule 50b of the Federal Rules of Civil Procedure, and further, whether the decisions of the United States Court of Appeals for the Ninth Circuit herein lies athwart the holding of the United States Supreme Court in *Johnson v. New York, New Haven and Hartford Railroad Company*, 344 U.S. at page 48, decided in 1952, which, as far as respondents have discovered, is the most receint decision on the subject rendered by the Supreme Court of the United States.

In order to determine whether or not the *Johnson* case has any application to the petition before us, it is necessary to review the procedural aspect of the case at bar as it progressed through trial and into the United States Court of Appeals for the Ninth Circuit.

The respondents, at the close of the plaintiffs' evidence in the case below, moved the trial Court on behalf of the defendants Birch, Lytle and Green, R. E. Wise and Ross McDonald, for an order dismissing the complaint of the plaintiffs under rule 41b. The Court reserved decision under rule 41 and the defendants proceeded to put on their case. See appendix pages ii-iii taken from the record pages 242 and 243.

The respondents Birch, Lytle and Green at the close of all of the evidence renewed their motion to dismiss as to both causes and moved the Court for a directed verdict and the Court again reserved decision. See

appendix pages iii-v taken from the transcript of the record, pages 408 and 409. The respondents and defendants below again, following the verdict dated October 8, 1955, within ten days following the verdict, and on the 12th day of October, 1955, for a judgment NOV and in the alternative for a new trial and in the further alternative for a remittitur. See appendix pages vi-vii and viii-ix taken from 08 vol. 1, pages 52 and 53; 07 vol. 1, pages 44, 45 and 46.

The trial Court denied respondents' motion for a judgment NOV and for a new trial under date of October 31, 1955, see appendix pages x-xiii, 07 vol. 1, pages 49, 50 and 51; 08 vol. 1, pages 57, 58 and 59; and further under date of December 30, 1955, denied the motion for a new trial as to all defendants, including the corporate partnership, provided that L. A. Martin would make a remittitur on the verdict under compensatory damages in the amount of $2500.00, see appendix pages xiv-xvii, record vol. 08, pages 60 and 61; 07 pages 51 and 52; the plaintiff L. A. Martin consented to the remittitur under date of January 6, 1956 and judgment was accordingly entered on verdicts 1 and 3 in the respective cases on the 17th day of January, 1956, from which judgments appeal was taken by the respondents herein resulting in a reversal as to the respondents only.

On this state of the record the petitioners seek certiorari to the Supreme Court of the United States to determine whether or not the Seventh Amendment to the Constitution of the United States of America has been abridged and on other grounds not clear to re-

spondents which apparently depend on petitioners' interpretation of two cases set forth in petitioners' second question.

## II.

### SUMMARY OF ARGUMENT.

It is well established by the rules of this Court that certiorari is a matter of sound judicial discretion and not a matter of right. It can be conceded that this Court has upon occasion reviewed the decisions of the several Circuits on occasions where conflict had developed between the several Circuits on interpretation of the Federal Rules of Civil Procedure. In the case at bar there is no abridgement of uniformity nor is there any conflict with the interpretation of the Federal Rules of Civil Procedure as decided in *Johnson v. New York, New Haven and Hartford Railroad Company*, ante, such as would require this Court to issue a writ for the purpose of such a review, and indeed the respondents contend that there is no question which would entitle the petitioners to a writ of certiorari and accordingly their petition should be denied.

We have heretofore recited, as we understand them, the questions presented herein at pages 2 and 3 of petitioners' brief. It is to be noted that the question as phrased by the petitioners is whether or not the Court of Appeals violated the Seventh Amendment to the Constitution of the United States of America by reversing a "*jury verdict*" of the Court below. How the petitioners could conclude that a "*jury verdict*"

was reversed upon reading the decision of the United States Court of Appeals for the Ninth Circuit is beyond the comprehension of the respondents. It is indeed true that the judgment of the lower Court in each of the combined cases was reversed as to the respondents only but nowhere was the verdict of the jury in any manner disturbed by the United States Court of Appeals for the Ninth Circuit. It is true that the judgment must, under the Circuit Court holding, be revised but the verdict remains inviolate. The holding of the United States Court of Appeals for the Ninth Circuit merely has the effect of saying that the respondents were and are entitled to a granting of their motion NOV.

The respondents submit that the United States Court of Appeals for the Ninth Circuit clearly indicates in its opinion that the jury had within its province, or had evidence before it, had it thought wise, to find the superintendents of the respondents, Wise and McDonald, negligent. The United States Court of Appeals for the Ninth Circuit did not quibble with the finding of the jury that McDonald and Wise were free of negligence, for indeed it must not. Judge Barnes who wrote the opinion for the Court stated in part as follows:

> "The fatal flaw in this latter theory is that the defendant partnership would be liable under the facts of this case only if its supervisorial employees, McDonald and Wise, had been derelict in the performance of their duties. The record does not disclose any independent negligent conduct on the part of the partnership itself. There is no evi-

> dence that the partners from the facts known or which should have been known to them, knew or should have known of the necessity of taking additional steps to protect the personal safety of passing motorists. If they had any duty to act, it was by and through their superintendents on duty. The record reveals that McDonald and Wise were the only superintendents on duty and at the scene of the fight. They provided the liquor and they were responsible for policing the premises and controlling the men. Yet the question of their negligence in respect to the control of the restricted area was submitted to the jury in the same instruction as was the question of negligence of the defendant partnership. The jury absolved both McDonald and Wise from individual responsibility. We can only conclude therefrom that it found neither was negligent. The master's liability being wholly derivative, the release of the servants bars any recovery against the master. 57 C.J.S., Master & Servant, Section 619 (b), p. 421-2."

In the face of this unmistakable concise language of the Court, the petitioners state at page 2 of their petition in substance that the question here presented was whether or not the United States Court of Appeals for the Ninth Circuit violated the Constitution of the United States by reversing a jury verdict.

Nothing could be clearer than the proposition that the United States Court of Appeals for the Ninth Circuit left undisturbed the verdict of the jury and indeed relied, as it should rely, upon the findings of the jury and upon such findings applied the law. Accord-

ingly question no. one presented by the petitioners must be resolved against them. It is clear upon an analysis of the procedure in the case at bar, that the question here presented is not the question presented in the *Johnson* case, nor does it find common consideration in the *Cone v. West Virginia Pulp & Paper Co.*, *Fountain v. Filson*, or any of the other cases cited by the petitioners.

While the earlier cases dealing with the interpretation of rule 50b of the Federal Rules of Civil Procedure are merged and clarified by the most recent holding cited by the petitioners, that being *Johnson v. New York, New Haven and Hartford Railroad Company*, decided in 1952, all of the cases recited by the petitioners have controlling elements which are not present in the case at bar. We think without exception that all of the cases dealing with rule 50b cited by the petitioners treat with situations where the Circuit Court of Appeals either granted affirmative relief in the absence of a proper motion, as was true in the *Johnson* case, or without motion at all, as was true in *Fountain v. Filson*. In the case at bar it is conceded that the appropriate motion NOV was made, for indeed that is admitted by the petitioners at page 8 of their brief and is supported by the appendix and references herein stated.

The respondents contend that the *Slocum* case has no application to the situation at bar because indeed it was decided 25 years before the advent of the Federal Rules of Civil Procedure, which became effective on the 16th day of September, 1938. The respondents

contend than an analysis of the petitioners' cases as cited will amply disclose that the holdings thereof have no parallel with the case at bar and fail utterly to support the contention of the petitioners.

The petitioners contend that the United States Court of Appeals for the Ninth Circuit holding in the case at bar conflicts with the District of Columbia case of *Lansburgh & Bro. Inc. v. Clark*, 127 Fed. (2d) 221. (It should be noted that inadvertently the petitioners have mis-cited the case above mentioned. It should be page 331.) The *Lansburgh* case stands for the proposition that where husband and wife institute independent suits against a tort-feasor for the injury to the wife, the wife's claim sounding in personal injury and the husband's claims sounding in loss of services or consortium, and where the wife's recovery was denied apparently by reason of contributory negligence, nevertheless the husband may have a valid ground for recovery and the failure of the wife to recover does not bar his action or disenfranchise his recovery. Just what application this has to the case at bar is not clear from the petitioners' brief. The respondents do not at this time wish to burden the Court with speculation as to the intention of the petitioners in citing the above mentioned case.

The respondents further contend that the authority of *Franklin v. May Dept. Stores Company*, 25 Fed. Supp. 735 (1938), as it applies to the case at bar, deserves the same treatment as the *Lansburgh* case last above mentioned, for in that case there was a petition for removal to the State Court which was overruled

by the District Court, Eastern District of Missouri. The action was against a non-resident corporation, owner of a department store, and a resident business manager, for injuries received by plaintiff's wife in a revolving door. It could not be remanded to the State Court where the petition merely alleged nonfeasance but no active negligence as to the manager defendant. The motion to remand was based on the assumption that the petition stated a cause of action against the resident defendant. It did not—there was diversity of citizenship as to the parties, and the case could not be remanded to the State Court for trial.

The respondents submit that there has been full compliance with the language and intent of rule 50b and that accordingly the petitioners have had their day in Court, the jury has determined the facts, the Court has applied the law and that the decision of the United States Court of Appeals for the Ninth Circuit requires no review by this Court.

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## III.

### ARGUMENT.

As we have heretofore stated, the respondents submit that there is but one question presented by the petitioners for the consideration of this Court and that is whether or not there has been an infraction of rule 50b of the Federal Rules of Civil Procedure. Respondents believe that the petitioners have shown no infraction of that rule and that accordingly if this Court reviews the holding of the United States Court

of Appeals for the Ninth Circuit, its review will be solely for the purpose of determining whether or not there has been compliance with rule 50b. Since the briefs before the Court disclose adequately that there has been compliance, then if this Court were to grant a writ of certiorari it would have to do so with the imminent intention in mind of modifying the rule laid down in *Johnson v. New York, New Haven and Hartford Railroad Company*, 344 U.S. 48, because it adequately appears that the Circuit Court followed the directives as established by this Court in 1952 in the case last mentioned.

Rule 19 of the revised rules of the Supreme Court of the United States, adopted April 12, 1954, effective July 1, 1954, and as amended to the present date, insofar as is here material, reads as follows:

> "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

See:

*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70;

*General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175;

*Magnum Import Co. v. Coty*, 262 U.S. 159;

*Layne and Bowler Corp. v. Western Well Workers, Inc.*, 261 U.S. 378.

The respondents submit that the petitioners have failed to show an entitlement to writ of certiorari

under the provisions of rule 19 above cited, as interpreted by the cases herein set forth.

The petitioners in support of their theory that there has been an abridgment of the Seventh Amendment to the Constitution of the United States of America and further that rule 50b of the Federal Rules of Civil Procedure has been violated, have recited six cases heretofore decided by the United States Supreme Court which respondents feel should be analyzed briefly in order to determine their application, if any, to the case at bar. For the purpose of this argument the cases will be discussed in their chronological order beginning with the 1913 case *Slocum v. New York Life Ins. Co.*, 228 U.S. 364. This was a five to four decision which no doubt has substantial historical importance in regard to the promulgation of rule 50b of the Federal Rules of Civil Procedure adopted many years after the decision in the *Slocum* case was pronounced.

The Court there was confronted with whether or not the Circuit Court of Appeals properly followed the Pennsylvania statute which allowed the Appellate Court under said statute to do the appropriate, obvious or necessary in correcting the judgments of the lower Courts when taken upon appeal in order to obviate multiple action. The United States Supreme Court decided that a Court of the United States could not, on a review of a case arising out of the State of Pennsylvania, follow the State Court practice as set forth in the statute (Penn. Laws 1905 page 386 c 198) without being in violation of the Seventh Amendment

because, as the majority opinion pointed out, the act of the Court of the United States in directing a verdict for the defendant abridged the Seventh Amendment. Neither the majority opinion in that case nor the dissenting opinion quarreled with the result of the Circuit Court of Appeals because, as Mr. Justice Hughes in his dissent said in part:

> "* * * This court concludes, as did the court of appeals, that 'the evidence did not admit of a finding that the policy was in force at the time of the insured's death.' In other words, after the plaintiff had had her full opportunity to present her case and to show facts for the consideration of the jury, and the case on both sides had been closed, it appeared that there were no facts whatever upon which the jury would be warranted in finding a verdict in her favor. * * *"

Since the Federal Rules of Civil Procedure have intervened and the case at bar involves not a statute of the jurisdiction of the forum but rather an interpretation and the application of rule 50b of the Federal Rules of Civil Procedure, there seems no good reason to further treat with the *Slocum* case except to mention it as being historically important as a beacon light for the formation of the Federal Rules. In the case at bar there was no direction to enter judgment in favor of the defendants but the lower Court was reversed in part for its failure to enter a judgment NOV, as to the respondents.

*Montgomery Ward & Co. v. Duncan* (1940), 311 U.S. 243 came to the United States Supreme Court

through the Eighth Circuit from an Arkansas trial resulting in a judgment for the plaintiff. At the close of the evidence in the trial Court the defendant moved for a directed verdict stating his grounds and likewise moved for a new trial. The trial Court, without ruling on the question of a new trial, directed a verdict for the defendant. The Eighth Circuit Court of Appeals reversed the trial Court, deciding that the District Court erred in holding the evidence insufficient to take the case to the jury and remanded the cause to the District Court with instructions to enter judgment on the verdict in favor of the plaintiff.

The Supreme Court in the *Montgomery Ward & Co. v. Duncan* case merely held that the United States Court of Appeals for the Eighth Circuit had overlooked the province of the District Court which had the right and authority to dispose of the defendant's motion for a new trial. The respondents have no doubt that the law of the *Montgomery Ward & Co. v. Duncan* case is still good law for the proposition for which it stands but submit that there is no showing on the part of the petitioners that there are any motions undisposed of in the lower Court nor any reason why the Ninth Circuit Court should, in the case at bar, remand the cause for further trial.

Following in chronological order, the petitioners cite *Galloway v. United States*, 319 U.S. 372, on appeal from the United States Court of Appeals for the Ninth Circuit, decided in 1943, which case involved a veteran of the first World War whose widow sued the United States on a policy of war risk insurance

which lapsed due to non-payment. The widow claimed insanity of the husband as a basis for non-payment by the husband by reason of his incompetency. Following the plaintiff's case the government moved for a directed verdict which was granted in the trial Court and sustained by the United States Court of Appeals for the Ninth Circuit.

The United States Supreme Court must have felt that the facts of that case involved special and important reasons for granting the writ of certiorari but after a mature consideration of the facts, the Court sustained the action of the United States Court of Appeals for the Ninth Circuit. The contention of the petitioner in that case was merely that his case was made and was substantial and that the Court's decision to the contrary was wrong and accordingly he had been deprived of the right to a jury trial. The contention of the petitioner in the *Galloway* case was not sustained in this Court. The petitioners herein, so far as respondents can ascertain, cited the *Galloway* case because they liked the language of the dissenting opinion, which may be understandable but is of no compelling force so far as the argument of the petitioners is concerned herein.

*Coac v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, decided in 1947 by the Supreme Court of the United States, involves the interpretation of rule 50b and treated with a situation where the prevailing party in the Circuit Court of Appeals had failed to move for a judgment NOV and notwithstanding such failure, the Circuit Court of Appeals had entered judgment for the respondent West Virginia Pulp &

Paper Co. instead of remanding the case to the District Court with instructions. The petitioners by their admission at page 8 of their brief clearly remove the *Cone v. West Virginia Pulp & Paper Co.* case from consideration, as a controlling proposition of law insofar as the case at bar is concerned.

The 1949 case of *Fountain v. Filson, et ux.*, 336 U.S. 681 was a per curiam opinion of the United States Supreme Court which dealt more properly with rule 56 of the Federal Rules of Civil Procedure in regard to summary judgment rather than rule 50b. The Court there determined that a summary judgment may be granted only if there is no dispute and no disputed facts and it was error in that case to deprive Mrs. Fountain of a chance to dispute the material facts. The respondents deem it vain and useless to quarrel with academic problems which clearly have no application to the case at bar and again urge the Court that *Fountain v. Filson* is abundantly distinguishable from the situation here to be considered by the Court.

The petitioners finally recite, in connection with their contention of abridgment of rule 50b, the 1952 case of *Johnson v. New York, New Haven and Hartford Railroad Co.*, 344 U.S. at page 48, in which case the railroad company made a pre-verdict motion for a directed verdict but a post-verdict motion to have the verdict set aside on the grounds that it was excessive and contrary to the law and the evidence and to the weight of the evidence. The majority opinion of the Supreme Court in the *Johnson* case determined that the railroad company had not properly moved and that the motion to have the verdict set aside was not

a motion NOV nor was the pre-verdict motion for a directed verdict to be deemed a post-verdict NOV motion within the rule. The Court there in summarizing the previous holdings of the Supreme Court said in part as follows:

> "* * * Rule 50b was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgment notwithstanding verdicts. State procedure was no longer to control federal courts as it had in the Redman and Kennedy cases. Federal courts were to be guided by this new rule, which provided its own exclusive procedural program. It rejected the New York procedure applied in the Redman case, which permitted judgment to be set aside even though no motion to do so had been filed after verdict. Instead it approached more closely the Pennsylvania rule, relied on in the Kennedy case, under which judgments contrary to verdicts would not be awarded in the absence of specific, timely motions for them. But rule 50 (b) departed from the New York and Pennsylvania procedures by making it wholly unnecessary for a judge to make an express reservation of his decision on a motion for directed verdict. The rule itself made the reservation automatic. A court is always 'deemed to have submitted the action to the jury subject to a later determination' of the right to a directed verdict if a motion for judgment notwithstanding the verdict is made 'within 10 days after the reception of a verdict * * *'. This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the post-verdict movant and thus emphasizes the importance of the legal issues. The movant can also

> ask for a new trial either for errors of law or on discretionary grounds. The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. * * *"

The respondents conclude that the petitioners are defeated by their own authority which they cite but do not properly apply. The effect of the petitioners' brief is to compile without classification; thus there is recited historical background of rule 50b without application. To make logical their position the petitioners should have urged that the Supreme Court of the United States modify its holding in the *Johnson* case.

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## IV.

### CONCLUSION.

The petition herein presented is without merit and is unsupported by authority and accordingly should be denied.

Dated, Anchorage, Alaska,
September 5, 1957.

Respectfully submitted,
DAVIS, HUGHES & THORSNESS,
By EDWARD V. DAVIS,
*Attorneys for Respondents.*

**(Appendix Follows.)**

## Appendix

Nos. 15,107-15,108

United States Court of Appeals
for the Ninth Circuit

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| S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellants, | No. 15,107 |
| vs. | |
| Robert L. Martin, Appellee. | |
| S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellants, | No. 15,108 |
| vs. | |
| L. A. Martin, Appellee. | |
| L. A. Martin, Appellant, | |
| vs. | |
| S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch Lytle & Green, Appellees. | |

"Mr. Bell. Your Honor, Plaintiffs will rest.

The Court. Very well. Counsel for the Defendants may call [183] their first witness.

Mr. Hughes. At this time, your Honor, Defendants for Birch, Lytle & Green, and Mr. McDonald and Mr. Wise wish to make a motion out of the hearing of the jury.

The Court. Very well. I wonder if the jury couldn't—if counsel doesn't object—take their, say, recess at this time for fifteen minutes. The court will remain in session to hear the motion and the Court would ask counsel to observe that all the jurors are out of the courtroom. You may proceed.

Mr. Thorsness. If your Honor please, the—counsel for the Defendants, Bud Weber and J. P. Bell would also like to make a motion at this time.

The Court: Very well. Will counsel please observe and note that all the jurors are out of the courtroom?

Mr. Bell. We agree.

The Court. Very well, you may make the motion, Mr. Hughes.

(Thereupon, out of the hearing of the jury, Mr. Hughes, counsel on behalf of the Defend-(242)* ants, Birch, Lytle & Green, R. E. Wise, and Ross McDonald, moves the Court for an Order dismissing the Complaint; after which Mr. Thorsness, on behalf of the Defendants, Bud Weber and J. P. Bell, moved for dismissal under Rule

*Figures in ( ) refer to Transcript of Record.

41b. Decision was reserved on all motions. After a short recess, court reconvenes and the following proceedings were had):

The Court. Let the record show that all the jurors are [184] back and present in the jury box. You may call your first witness, Mr. Hughes.

Mr. Hughes. I take it, your Honor has not ruled on the—you reserved decision?

The Court. Under Rule 41, the Court reserves decision.

Mr. Hughes. I see, your Honor. I will call Mr. Manor.

The Court. Very well. Mr. Vaughn Manor may come forward and be sworn. (243)"

"(Whereupon, at 10:50 o'clock a.m., following a 10-minute recess, court reconvenes and the following proceedings were had):

The Court. Let the record show that the court resumes the trial of this case without the presence of any jurors. The court would ask counsel to look around the courtroom to see if any [369] jurors are present in the courtroom. Very well, let the record show counsel do not find any. You may proceed, Mr. Hughes.

(Whereupon, Mr. Hughes, on behalf of S. Birch & Sons, C. F. Lytle and Green, Ross McDonald and R. E. Wise, renews motion to dismiss as to both causes and moves the court for directed verdict. The court reserved decision.)

(Whereupon, Mr. Thorsness, on behalf of J. P. Bell and Bud Weber, renews motion to dismiss as to both causes and moves the court for directed verdict. The court reserved decision.)

The Court. The instructions are complete and are now being numbered. They are rather lengthy and I would think counsel would want a few minutes in which to read them over, therefore, the court will go into recess until the call of the gavel. Before doing so, I would like to inquire if counsel have drawn a copy of the blackboard drawing?

Mr. Bell. We have, your Honor.

The Court. Has that been admitted in evidence? (408)

Mr. Bell. It has not, your Honor. May we get it and see if Mr. Hughes will—I didn't do it. I got Mr. Martin to do it, the senior Mr. Martin, and he could do it better than I could. The drawing is still on the blackboard.

The Court. Is there any objection, Mr. Hughes and [370] Mr. Thorsness?

Mr. Hughes. I have no objection to the drawing. I think that it's a reasonable facsimile of the exhibit on the blackboard.

Mr. Thorsness. No objection, your Honor.

The Court. Very well. It may be admitted and marked Plaintiff's Exhibit No. 1. Now, the court will go into recess until 11:30.

(Whereupon, at 11:30 o'clock a.m., following a 20-minute recess, court reconvenes, and fol-

lowing a discussion regarding another case, the following proceedings were had):

The Court. Well, that has taken up, ladies and gentlemen of the jury, sufficient time I don't think it will be fair to counsel to require them to argue at this time. You can appreciate the problems the court is confronted with based upon the fact we have so much work. Therefore, the trial of this case will have to be continued until 2:00 p.m. this afternoon. Under the law I must instruct you not to discuss this case among yourselves nor to permit others to discuss it with you. The court will stand in recess until the call of the gavel.

(Whereupon, at 11:50 o'clock a.m., the court continued the cause to 2:00 o'clock p.m., of the same day.) [371] (409)"

[Title of District Court and Cause No. A-8237.]

## MOTION FOR JUDGMENT FOR DEFENDANT BIRCH, LYTLE & GREEN

Come now Birch, Lytle & Green, consisting of S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, one of the above named defendants, and for itself and not for its co-defendants, moves that the verdict of the jury in the above entitled cause rendered on the 8th day of October, 1955, and read in open Court on the 10th day of October, 1955, be set aside and held for naught and that judgment in the above entitled action may be rendered in favor of the defendants Birch, Lytle & Green and (52) against the plaintiff L. A. Martin, notwithstanding the verdict of the jury. If judgment has been entered in the above entitled cause according to the verdict of the jury, then defendants Birch, Lytle & Green move that such judgment may be set aside and that judgment may be entered in favor of the defendants Birch, Lytle & Green and against the plaintiff L. A. Martin.

This motion is based upon the fact that at the close of ptaintiff's evidence and again at the close of all the evidence defendants Birch, Lytle & Green moved for a directed verdict or a motion to dismiss which may be deemed a directed verdict, in its favor or for judgment in its favor, all as will more fully appear from the records and files of this action and for the reason that the verdict as rendered is not based upon any competent evidence and is not based upon law as applied to the evidence and is contrary to the evidence

and the law applicable thereto as instructed by the Court.

In the alternative the defendants Birch, Lytle & Green pray for a new trial in this matter, and in the further alternative defendants Birch, Lytle & Green move for an order of remittitur or reduction of judgment consistent with the proof of the plaintiff, which remittitur should reduce the recovery of the plaintiff in any event to not more than $2500.00 and should as a matter of course order the remittitur of punitive damages which should never have been submitted to the jury as these defendants believe under the facts and the law. (53)

This motion is based upon all of the records and files of the above entitled action.

Dated at Anchorage, Third Division, Territory of Alaska, this 11th day of October, 1955.

Davis, Renfrew & Hughes,
/s/ By John C. Hughes,
Attorneys for Defendants
Birch, Lytle & Green.

Receipt of Copy Acknowledged.
[Endorsed]: Filed October 12, 1955. (54)"

"[Title of District Court and Cause.]

## MOTION FOR JUDGMENT FOR DEFENDANT BIRCH, LYTLE & GREEN

Come now Birch, Lytle & Green, consisting of S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, one of the above named defendants, and for itself and not for its co-defendants, moves that the (44) verdict of the jury in the above entitled cause rendered on the 8th day of October, 1955, and read in open Court on the 10th day of October, 1955, be set aside and held for naught and that judgment in the above entitled cause may be rendered in favor of the defendants Birch, Lytle & Green and against the plaintiff Robert L. Martin, notwithstanding the verdict of the jury. If judgment has been entered in the above entitled cause according to the verdict of the jury, then defendants Birch, Lytle & Green move that such judgment may be set aside and that judgment may be entered in favor of the defendants Birch, Lytle & Green and against the plaintiff Robert L. Martin.

This motion is based upon the fact that at the close of plaintiff's evidence and again at the close of all the evidence defendants Birch, Lytle & Green moved for a directed verdict or a motion to dismiss which may be deemed a directed verdict, in its favor or for judgment in its favor, all as will more fully appear from the records and files of this action and for the reason that the verdict as rendered is not based upon any competent evidence and is not based upon law as applied to the evidence and is contrary to the

evidence and the law applicable thereto as instructed by the Court.

In the alternative the defendants Birch, Lytle & Green pray for a new trial in this matter, and in the further alternative defendants Birch, Lytle & Green move for an order of remittitur or reduction of judgment consistent with the proof of the plaintiff, which remittitur should reduce the recovery of (45) the plaintiff in any event to not more than $2560.00 and should as a matter of course order the remittitur of punitive damages which should never have been submitted to the jury as these defendants believe under the facts and the law.

This motion is based upon all of the records and files of the above entitled action.

Dated at Anchorage, Third Division, District of Alaska, this 11th day of October, 1955.

Davis, Renfrew & Hughes,

/s/ By John C. Hughes,

Attorneys for Defendants
Birch, Lytle & Green.

Receipt of Copy Acknowledged.

[Endorsed]: Filed October 12, 1955. (46)"

[Title of District Court and Cause.]

HEARING ON MOTIONS FOR JUDGMENT FOR BIRCH, LYTLE & GREEN; EXCEPTIONS TO COST BILL AND IN ALTERNATIVE A MOTION TO STRIKE; EXCEPTIONS TO PROPOSED JUDGMENT; MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AS TO DEFENDANTS BELL & WEBER; MOTION IN ALTERNATIVE FOR NEW TRIAL AS TO DEFENDANTS BELL AND WEBER, CONTINUED.

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time came the respective counsel as heretofore and the Hearing on Motions for Judgment for Birch, Lytle & Green; Exceptions to Cost Bill and in Alternative a Motion to Strike; Exceptions to Proposed Judgment; Motion for Judgment in Accordance with Motion for Directed Verdict as To Defendants Bell & Weber; Motion in alternative for New Trial as to Defendants Bell and Weber in causes No. A-8212, entitled Robert L. Martin, plaintiff, versus S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, Partners, doing business as Birch, Lytle & Green, Ross McDonald, Joe Sapes, J. P. Bell, Bud Weber and R. E. Wise, defendants (B) and No. A-8237, entitled L. A. Martin, plaintiff versus S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, Partners,

doing business as Birch, Lytle & Green, Ross McDonald, Joe Sipes, J. P. Bell, Bud Weber, and R. E. Wise, defendants, was resumed.

Closing argument to the Court was resumed by John C. Hughes, for and in behalf of the Defendants, Birch, Lytle & Green.

Closing argument to the Court was had by David R. Thorsness, for and in behalf of the Defendants, Bell & Weber.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises, denied motions for Judgment for Birch, Lytle & Green, and motions for judgment in accordance for Directed Verdict as to Defendants Bell and Weber, and Motion in alternative for New Trial as to Defendants, Bell and Weber; reserved its decision as to question of Remittitur and counsel for Defendants, Birch, Lytle and Green given to the 20th day of November, 1955 within which to file brief on question of remittitur, counsel for plaintiffs to have ten (10) days thereafter within which to file answering brief.

The Court further rules that the plaintiffs are not residents of the Territory of Alaska, but are residents of the State of Washington; Court further rules that Defendants, Wise and McDonald are entitled to costs and expenses and reasonable attorney's fees to be fixed later; Court further rules that (50) the appearances of Dr. James E. O'Malley and Mrs. Nancy Underwood are to be figured as one appearance Cost.

Entered Journal No. 642, Page No. 146, October 31, 1955. (51)"

[Time of District Court and Causes A-8212 and A-8237.]

HEARING ON MOTIONS FOR JUDGMENT FOR BIRCH, LYTLE & GREEN; EXCEPTIONS TO COST BILL AND IN ALTERNATIVE A MOTION TO STRIKE; EXCEPTIONS TO PROPOSED JUDGMENT; MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT AS TO DEFENDANTS BELL & WEBER; MOTION IN ALTERNATIVE FOR NEW TRIAL AS TO DEFENDANTS BELL AND WEBER, CONTINUED.

Now at this time, these causes coming on to be (57) heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had to-wit:

Now at this time came the respective counsel heretofore and the Hearing on Motions for Judgment for Birch, Lytle & Green; Exceptions to Cost Bill and in Alternative a Motion to Strike; Exceptions to Proposed Judgment; Motion for Judgment in Accordance with Motion for Directed Verdict as To Defendants Bell & Weber; Motion in alternative for New Trial as to Defendants Bell and Weber in causes No. A-8212, entitled Robert L. Martin, plaintiff, versus S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, Partners, doing business as Birch, Lytle & Green; Ross McDonald, Joe Sipes, J. P. Bell, Bud Weber; and R. E. Wise, defendants and No. A-8237, entitled L. A. Martin, plaintiff, versus S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Com-

pany, a corporation, Partners, doing business as Birch, Lytle & Green, Ross McDonald, Joe Sipes, J. P. Bell, Bud Weber, and R. E. Wise, defendants, was resumed.

Closing argument to the Court was resumed by John C. Hughes, for and in behalf of the Defendants, Birch, Lytle & Green.

Closing argument to the Court was had by David R. Thorsness, for and in behalf of the Defendants, Bell & Weber.

Whereupon, Court having heard the arguments of (58) respective counsel and being fully and duly advised in the premises, denied motions for Judgment for Birch, Lytle & Green, and motions for judgment in accordance for Directed Verdict, as to Defendants Bell and Weber, and Motion in alternative for New Trial as to Defendants, Bell and Weber; reserved its decision as to question of Remittitur and counsel for Defendants, Birch, Lytle and Green given to the 20th day of November, 1955 within which to file brief on question of remittitur, counsel for plaintiffs to have ten (10) days thereafter within which to file answering brief.

The Court further rules that the plaintiffs are not residents of the Territory of Alaska, but are residents of the State of Washington; Court further rules that Defendants, Wise and McDonald are entitled to costs and expenses and reasonable attorney's fees to be fixed later; Court further rules that the appearances of Dr. James E. O'Malley and Mrs. Nancy Underwood are to be figured as one appearance Cost.

Entered Journal No. 642, Page No. 146, October 31, 1955. (59)"

"[Title of District Court and Causes A-8212 and A-8237.]

M. O. DENYING MOTION FOR NEW TRIAL GRANTING MOTION FOR REMITTITUR AND DENYING MOTION FOR ALLOWANCE OF ATTORNEYS' FEE AND COURT COSTS FOR DEFENDANTS WISE AND McDONALD.

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had to-wit:

Now at this time motions having heretofore been argued to the Court on the 31st day of October, 1955 in causes Nos. A-8212, entitled Robert L. Martin, plaintiff, versus S. Birch & Sons, a corporation, C. F. Lytle, a corporation and Green Construction Company, a corporation, partners d/b/a Birch Lytle & Green, Ross McDonald, Joe Sipes, J. P. Bell and R. E. Wise, defendants and A-8237, entitled L. A. Martin, plaintiff, versus S. Birch & Sons, a corporation, C. F. Lytle, a corporation and Green Construction Company, a corporation, partners, d/b/a Birch Lytle & Green, Ross McDonald, Joe Sipes, J. P. Bell, Bud Weber and R. E. Wise, Defendants.

It Is Ordered that motion for new trial, be, and it is hereby denied as to all defendants provided that in cause No. A-8237, L. A. Martin will make a remittitur on the verdict under compensatory dam-(60)ages in the sum of $2,500. Motion for allowance of Attorneys' Fee and Court costs for defendants Wise and McDonald be, and they are hereby, denied and none are allowed.

Entered Journal No. 643, Page No. 130, December 30, 1955.

[Title of District Court and Cause No. A-8237]

## CONSENT TO REMITTITUR.

Comes now the Plaintiff above named, L. A. Martin, by and through his attorneys, Bell, Sanders & Tallman, and consents to a remittitur on the verdict of the jury under compensatory damages in the sum of $2,500.00, in accordance with that certain minute order dated December 30, 1955, on file herein.

Dated this 6th day of January, 1956.

Bell, Sanders & Tallman,

/s/ James K. Tallman,

Attorneys for Plaintiff.

Service of Copy Acknowledged.

[Endorsed]: Filed January 6, 1956. (61)"

"[Title of District Court and Cause.]

M. O. DENYING MOTION FOR NEW TRIAL; GRANTING MOTION FOR REMITTITUR AND DENYING MOTION FOR ALLOWANCE OF ATTORNEYS' FEE AND COURT COSTS FOR DEFENDANTS WISE AND McDONALD.

Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time motions having heretofore been argued to the Court on the 31st day of October, 1955 in causes Nos. A-8212, entitled Robert L. Martin, plaintiff, versus S. Birch & Sons, a corporation, C. F. Lytle, a corporation and Green Construction Company, a corporation, partners, d/b a Birch Lytle & Green, Ross McDonald, Joe Sipes, J. P. Bell and R. E. Wise, defendants and A-8237, entitled L. A. Martin, plaintiff, versus S. Birch & Sons, a corporation, C. F. Lytle, a corporation and Green Construction Company, a corporation, partners, d/b a Birch, Lytle & Green, Ross McDonald, Joe (51) Sipes, J. P. Bell, Bud Weber and R. E. Wise, Defendants.

It Is Ordered that motion for new trial, be, and it is hereby denied as to all defendants provided that in cause No. A-8237, L. A. Martin will make a remittitur on the verdict under compensatory damages in the sum of $2,500. Motion for allowance of Attorneys'

Fee and Court costs for defendants Wise and McDonald be, and they are, hereby, denied and none are allowed.

Entered Journal No. 643, Page No. 130, December 30, 1955. (52)"